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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1941

No. 527

CARPENTERS AND JOINERS UNION OF AMERICA, LOCAL No. 213 et al.
*Petitioner*

v.

RITTER'S CAFE et al.
*Respondents*

On Application for Rehearing

## BRIEF ON BEHALF OF CONGRESS OF INDUSTRIAL ORGANIZATIONS AMICUS CURIAE

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THE CORNELIUS PRINTING COMPANY

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## STATEMENT

This brief is submitted amicus curiae on behalf of the Congress of Industrial Organizations, hereinafter referred to as the CIO. The CIO is an unincorporated association, composed of affiliated labor unions, with a membership of approximately 5,000,000. It embraces workers in such vital industries as coal mining, transportation, clothing, automobiles, rubber, steel, aluminum, and aviation.

Neither the defendant union nor any of the individual defendants in this case are affiliated with the CIO. This

brief is submitted to the court because the constitutional issue in this case is of such vital significance to the welfare of organized labor as a whole.

The CIO is deeply disturbed by the decision which has been rendered by this Court in this matter. The decision creates confusions and obscurities which leave labor in the dark as to the scope of the constitutional protection of its picketing rights. In the creation of those confusions and obscurities, moreover, the Court has departed very sharply from constitutional doctrines to which it has only recently recommitted itself.

## Questions Raised by the Court's Decision.

It is regrettable that in deciding this case the Court has not clearly formulated the basic premises of its decision, nor more important, has it made clear the precise scope of the decision.

In the first succinct statement of the doctrine which it was enunciating the Court said:

> "... recognition of peaceful picketing as an exercise of free speech does not imply that the states must be without power to confine the sphere of communication to that directly related to the dispute." [62 S. Ct. 807, 810].

In what sense is the phrase "sphere of communication" intended? We must assume that the phrase is not intended to refer to the *substance* of the "communication." Certainly, in the absence of obscenity, falsehood, abusiveness, provocation, incitement or related considerations, none of which are claimed to be present here, the constitutional protection has never depended on the nature of the facts which are communicated. Certainly this Court has never said that certain facts may be the

subject of public communication or that other facts may not.

We must assume in short that this Court has not held that the State of Texas may prohibit the Union from any public intimation by printed or spoken word, by pamphlet, press, radio, or speech, of the fact that the non-union contractor, Plaster, has been hired by the restaurant owner, Ritter. We would make this assumption even in the absence of any guidance in the opinion. The indications in the opinion, however, support the assumption. The opinion, for example, carefully notes that:

> "The decree forbade neither picketing elsewhere (including the building under construction by Plaster) nor communication of the facts of the dispute by any means other than the picketing of Ritter's restaurant [62 S. Ct. at 808].

The Court further emphasized the consideration that:

> "The State has not attempted to outlaw whatever psychological pressure may be involved in the mere communication by an individual of the facts relating to his differences with another." [62 S. Ct. at 809].

Even more specifically:

> "Restriction of picketing to the area of the industry within which a labor dispute arises leaves open to the disputants other traditional modes of communication." [62 S. Ct. at 810]

The conclusion that the statements on the picket signs have been determined to be without constitutional protection, not because of their content, but because of the *locale* of the picketing does not dispose of the many questions raised and left unanswered by the Court's de-

cision. This Court has previously said in the case of *Schneider v. New Jersey*, 308 U. S. 147:

> "... The streets are natural and proper places for dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." [p. 163]

Thus the streets generally may not be closed to the dissemination of information and opinion simply because other places are available. Nor may certain streets be closed to dissemination of views simply because others are available. (*Hague v. CIO*, 307 U. S. 496.) Even more specifically this Court has determined, citing the quotation from the *Schneider* case supra, that even the general danger of breach of the peace at the scene of a labor dispute cannot warrant the closing of that place to dissemination of information and opinion:

> "It is not enough to say that Section 3448 is limited or restricted in its application to such activity as takes place at the scene of the labor dispute.... [quotation from *Schneider* case]. . . . The danger of breach of the peace or serious invasion of rights of property or privacy at the scene of a labor dispute is not sufficiently imminent in all cases to warrant the legislature in determining that such place is not appropriate for the range of activities outlawed by Section 3448". (*Thornhill v. Alabama*, 310 U. S. 88)

What then, is it that upholds the state in restricting utterances in the vicinity of the Ritter establishment? Is "the danger of breach of the peace or serious invasion of rights of property or privacy" so "imminent" in this case? There is not even any question of violence or breach of peace or serious invasion of property rights.

There is no background of violence nor is there any suggestion that there is any danger of violence (cf. *Milk Wagon Drivers Union v. Meadowmoor Dairies Inc.*, 312 U. S. 387).

In this instance the Court in its decision has turned to an entirely new concept in the constitutional law relating to free speech. A clue to the nature of this concept is found in the Court's reference to the power of the State "to confine the use of this industrial weapon within reasonable bounds" [62 S. Ct. at 809]. Further light is cast by the Court's reference to the action of the State as a prohibition of "the exertion of concerted pressure directed at" a person outside the direct employer-employee conflict. And again, in changed metaphor, the Court declares that to uphold the right of free speech before Ritter's establishment would be to compel the states to allow disputants to "conscript neutrals." This marks the first time in our constitutional history that in an analysis of the content of the free speech guarantee mere utterances have been viewed not as dissemination of opinion and information, but as an "industrial weapon" and as "concerted pressure" and as "conscription" of persons to whom those utterances are directed. This is an approach upon which this Court should not embark without very sober deliberation.

To "confine" the "industrial weapon," to prohibit the exertion of "concerted pressure" or the "conscription" of "neutrals", means, within the specific context of the case at bar, to prevent the use of that "weapon" and to prevent the application of that "pressure" against a particular individual or particular individuals. It means specifically in the present case that Texas may constitutionally prevent the application of that "weapon" to

Ritter or prevent the application of that "pressure" against Ritter.

But it must be recalled that the "pressure" and the "weapon" constitute nothing more than the dissemination of the fact that Ritter had employed a non-union contractor. If the dissemination of that fact, by virture of a sign carried by a picket, constitutes a "weapon" and a means of "pressure" or "conscription," the dissemination of that fact constitutes no less a "weapon" and a "pressure" and a "conscription" when accomplished by word of mouth, by pamphlet, by newspaper, or by radio. If in the words of this Court's opinion, the intention of Texas is to "insulate from the dispute an establishment", that insulation can be accomplished only by prevention of any public knowledge of the facts concerning the establishment which the union is attempting to bring to the attention of the public. There would be little room for distinction between the dissemination of that information by picket or by any other means.

Nor is it an answer to suggest that the picketing as a means of disseminating information is more effective as a "weapon" or as a means of "pressure" or "conscription". A letter directed to Ritter's customers, a newspaper distributed to Ritter's customers, a radio broadcast which reaches Ritter's customers, a street corner address heard by Ritter's customers can be presumed to have the same effect. Certainly the cases of *Thornhill* (supra) and *Carlson* (supra) and *A. F. of L. v. Swing*, 312 U. S. 321, make no distinction between picketing and other means of dissemination of information. We assume that this Court would not say that constitutional protection for dissemination of the information by newspaper or radio or street corner speech would depend

upon the extent to which the information disseminated had come to the attention of or might be expected to come to the attention of the persons most interested in it, Ritter's customers.

There is a basic and very dangerous fallacy in this doctrine that the dissemination of information may be "confined" or "prohibited" because the act of dissemination is viewed as a "weapon" or as a means of bringing "pressure." It cannot be too often repeated that the "weapon," if such it be called, consists merely of facts, information, and opinion and that the "pressure," if any results is the product merely of facts, information and opinion.

Facts, information and opinion do not constitute a peculiarly "industrial" weapon, nor are "pressures" resulting from them peculiar to the industrial field. Words and arguments are social weapons. It is precisely for that reason that they are accorded constitutional protection. It is because the clash of the "weapons" of argument in the arena of ideas (to rephrase an older metaphor in the shape of the new one which this Court's opinion has adopted) is regarded as the best means of developing the strongest democracy and is expected to result in the victory of the soundest argument that our constitution prohibits interference with that contest of ideas. Facts, information and ideas frequently result in action and action based on ideas and information frequently results in pressures in our society. Our constitution is based on the assumption that action instigated by ideas and information is desirable. It is precisely those "pressures" which are protected by the constitutional guarantee of free speech.

## The Decisions of this Court on Picketing Rights.

The dangers implicit in the novel approach taken by the Court in its opinion in this matter point to a very dangerous departure from the basic doctrines of recent decisions.

In the *Thornhill* case, *supra*, this Court enunciated the foundation of constitutional protection for public discussion of matters of public concern:

> "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." [310 U. S. at 101-102]

In the *Thornhill* case, *supra*, this Court enunciated the equally basic doctrine that industrial conditions and labor relations constitute matters of public concern within this fundamental constitutional protection:

> "The merest glance at State and Federal legislation on the subject demonstrates the force of the argument that labor relations are not matters of mere local or private concern. Free discussion concerning the conditions in industry and the causes of labor disputes appears to be indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society." [310 U. S. at 103]

Are there limitations on this liberty of public discussion of matters of public concern? Of course there are. The issue is not, as was suggested in this Court's opinion, [62 S. Ct. at 809] whether "peaceful picketing must be wholly immune from regulation by the com-

munity". This Court in the *Thornhill* case, supra, stated the normal limitations on all forms of public expression:

> "The power and the duty of the state to take adequate steps to preserve the peace and to protect the privacy, the lives, and the property of its residents, cannot be doubted. But no clear and present danger of a distruction of life or property, or invasion of the right of privacy, or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter." [310 U. S. at 105]

The substantive evil to which any valid restriction of free speech must be directed must be one sufficiently grave to warrant an invasion of so vital a constitutional guarantee. This Court has thus far recognized only violence or a clear and present danger of it as such a justification.

*Milk Wagon Drivers Union v. Meadowmoor, supra.*

*Thornhill v. Alabama, supra.*

*DeJonge v. Oregon*, 299 U. S. 353.

The Court has specifically rejected cleanliness of the streets (*Schneider v. New Jersey*, supra,) or the mere general possibility of violence (*Thornhill v. Alabama, supra; A. F. L. v. Swing, supra; Cantwell v. Connecticut*, 310 U. S. 296) as justifications for restriction on the right of free speech through picketing or otherwise. Most important from the point of view of the nature of the restriction imposed in this case, this Court has rejected the economic consequences which may affect a given individual as the result of the truthful dissemination of facts as any justification for interference with the dissemination of those facts:

"The right of free communication cannot therefore be mutilated by denying it to workers in a dispute with an employer even though they are not in his employ. Communication by such employees of the facts of a dispute, deemed by them to be revelant to their interests, can no more be barred because of concern for the economic interests against which they are seeking to enlist public opinion than could the utterance protected in Thornhill's case." (*A.F.L. v. Swing, supra,* 312 U. S. at 326).

The Constitutional guarantee of free speech is one in which the mere legislative determination of desirable state policy is not paramount. On that subject, this Court said in *Schneider v. New Jersey, supra:*

"Mere legislative preferences or beliefs respecting matters of public convenience may well support legislation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights". (308 U. S. at 147)

On the same subject, this Court said:

"Mere legislative preference for one rather than another means for combatting substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions. It is imperative that, when the effective exercise of these rights is claimed to be abridged, the courts should 'weigh the circumstances' and

'appraise the substantiality of the reasons advanced' in support of the challenged regulations." (*Thornhill v. Alabama*, 310 U. S. at 95-6)

The Court in *A. F. L. v. Swing, supra*, said:

"The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limitations be defined by statute or by the judicial organ of the state. A state cannot exclude working men from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him." [312 U. S. at 325-326]

## CONCLUSION

The basic principles governing the exercise of free speech in this country are thus clear even if their application may be difficult in individual cases. A departure from them such as that contemplated in the present case is fraught with danger. To protect an individual from the social "pressure" of words emblazoned on a placard leads to protection of an individual from the social "pressure" of words on a printed page, and of the spoken word. It leads to that consequence unless we are to create distinctions between media of communication, or unless we are to draw tenuous lines based on the extent to which the communication may be deemed to be effective. And if the constitutional right to free speech is to be denied at the point where the exercise of free speech becomes effective to influence the actions of men, then the right to free speech is denied at the point where free speech becomes meaningful.

We respectfully submit that these are not the times

to embark upon these dangerous lines of thought. The decision of the Court in this case is fraught with those dangers. We respectfully urge that the Court reconsider its determination and upon reconsideration revise its conclusion in conformity with the important principles which this Court has affirmed in these last few years.

Respectfully submitted,

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